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# In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 140

UNITED STATES OF AMERICA, PETITIONER

*v.*

WILLIAM ROSEN

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing respondent's conviction, in the United States District Court for the Southern District of New York, of contempt of court.

OPINION BELOW

The opinion of the Court of Appeals (R. 69-76) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 25, 1949 (R. 77). On May 20, by order of Mr. Justice Jackson, the time within which to

file this petition for a writ of certiorari was extended to June 24, 1949 (R. 78). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

### QUESTION PRESENTED

Whether the danger of self-incrimination to be apprehended from answers to a series of questions propounded to respondent before a grand jury is sufficiently real and substantial to justify his refusal to answer them.

### STATEMENT

On March 2 and 3, 1949, respondent appeared before a grand jury of the District Court for the Southern District of New York and refused to answer certain questions addressed to him on the ground that his answers would tend to incriminate him. He was directed by District Judge Rifkind to answer those questions but, on his reappearance before the grand jury on March 7, 1949, he persisted in his refusal. On motion of the Government to hold respondent in contempt, a hearing was held before Judge Rifkind on the same date. (R. 22-51.)

The questions which respondent refused to answer before the grand jury on March 7, 1949, in disobedience of the District Court's order, were these (R. 25-29):

> Q. * * * I show you Grand Jury Exhibit No. 103, which is a certificate of title of a motor

vehicle issued by the Director of Vehicles & Traffic of the District of Columbia, for a Ford roadster, which certificate contains a purchase application for new certificate of title, bearing the name William Rosen, signature William Rosen, and an affidavit given before Notary Public Henry J. Gertler on July 23rd, 1939, and I ask you have you seen this document in any form, either the original or the copy, have you previously seen this document in any form either the original or the copy? * * * Prior to the time the committee or any representative of the Committee on Un-American Activities exhibited to you a copy of that document, had you ever seen the original or a copy of the document?

Q. Mr. Rosen, Judge Rifkind instructed you in court on March 3rd that you were to answer the question that was asked you as to whether you desired to change your answer of "No" to the question as to whether you knew Mr. Gertler, and that is what I am asking you, do you desire to change your answer of "No" to the question as to whether you knew Mr. Gertler, as to whether you ever met or had any conversation with Mr. Gertler? * * * I again ask you the question as to whether you desire to change your answer which you gave before the grand jury on March 3rd when you said "No" to the juror's question as to whether you had ever met or had any conversation with Mr. Gertler?

Q. Mr. Rosen, did you ever own a Ford roadster? That question was asked you on March 3rd in the grand jury room, and Judge Rifkind instructed you when you appeared

before him to answer the question. What is your answer?

Q. Mr. Rosen, I am again asking you a question which you were asked in the grand jury on March 3rd, 1949, and which Judge Rifkind instructed you to answer: "Mr. Rosen, did you ever own a Ford automobile?"

Q. I am now asking you a question which was asked you before the grand jury on March 3rd, 1949 and which Judge Rifkind instructed you to answer: "Mr. Rosen, did you ever seek to obtain a certificate of title or to register a Ford automobile at any time?"

Q. Mr. Rosen, I am again asking you a question which was asked before the grand jury on March 3rd, 1949, and which Judge Rifkind on that same date instructed you to answer: "Did you appear before a notary public, Henry J. Gertler, in Washington, D. C., on July 23rd, 1936?"

Q. Mr. Rosen, I am again asking you a question which you were asked by a juror in the grand jury room on March 3rd, 1949 and which Judge Rifkind instructed you to answer on the same date when you appeared before him in court. Question by a juror: "Well, if you were not in Washington, if it is true that you were not in Washington on that particular day, how could you possibly have had any connection with the signing of this document and, therefore, why can't you say that you did not sign that document or that you did not appear before Mr. Gertler?"

Q. Mr. Rosen, I am again asking you a question which you were asked before the grand

jury on March 3rd, 1949 and which Judge Rifkind subsequently instructed you to answer: "Did you ever purchase an automobile from any automobile dealer either in Washington or New York other than the Cherner Motor Car Company?"

Q. The next question was, "I correct my question: What model of Ford car did you drive?"

Q. I am asking you a question, Mr. Rosen, which you were previously asked before the grand jury on March 3rd, 1949, and which question Judge Rifkind on that same date instructed you to answer: "Mr. Rosen, were you ever on the premises of the Cherner Motor Company, 1781 Florida Avenue, N. W., Washington, D. C.?"

Q. Did you ever purchase an automobile in Washington, D. C.?

The evidence which was adduced in support of respondent's claim of privilege against self-incrimination may be summarized as follows:

(1) An indictment filed December 15, 1948, in the District Court for the Southern District of New York charged Alger Hiss with perjury committed before a grand jury which was conducting an investigation "into possible violations of espionage laws of the United States and any other Federal criminal statutes." The alleged perjury consisted of testimony by Hiss, a former State Department official, that he had not turned over any documents of the State Department to Whittaker

Chambers and that he had not seen Chambers after January 1, 1937, whereas he had allegedly transmitted such documents to Chambers in February and March, 1938, and had seen him at those times. (R. 63-65.)

(2) An indictment, of which Judge Rifkind took judicial notice (R. 34), was pending in the District Court for the Southern District of New York against 12 individuals who were charged with conspiring on and after April 1, 1945, "to organize as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence, which said acts are prohibited by Section 2 of the act of June 28, 1940 (Section 10, Title 18, United States Code), commonly known as the Smith Act."[1]

(3) Elizabeth Bentley testified before the Committee on Un-American Activities of the House of Representatives in 1948 to the effect that Communist espionage rings had operated within the Government of the United States and that confidential documents had been obtained from

[1] Other indictments filed against the several defendants in the conspiracy indictment charged each of them with the substantive offense of having been a member of the Communist Party of the United States since July 26, 1945, knowing that during said period the Communist Party taught and advocated the overthrow and destruction of the Government by force and violence.

various departments and agencies of the Government for transmission to Soviet intelligence officers. Whittaker Chambers testified that in the 1930's he was a Communist and had acted as a courier of the so-called "underground" of the Communist Party, which was engaged in espionage activities in this country on behalf of Russia. He testified further that Alger Hiss was a member of a Communist "cell" which had been set up for the purpose of infiltrating the Government of the United States to serve the objective of the Soviet Union. (Ex. B, pp. 563-584.)

Hiss then appeared before the Committee on Un-American Activities and, after first denying any knowledge of Chambers, testified that he remembered him as a free-lance writer by the name of George Crosley who had come to Hiss's office for material for a series of magazine articles about the work of the Senate Committee investigating the munitions industry, when Hiss was its chief counsel. Hiss stated that he sublet his apartment to "Crosley" in 1935, and, in connection with the sublease, "threw in" an old 1929 Ford Model A Roadster. Hiss denied affiliation with the Communist Party at any time. (Ex. B, pp. 642-659, 935-1001, 1077-1111, especially pp. 957, 982-983, 1097-1111.)

Chambers again appeared before the Committee and testified that Hiss was an active member of the Communist "apparatus" for subversive operations. He flatly contradicted the previous testimony of Hiss and denied that he had ever been known as George Crosley or that he had ever rented

an apartment from Hiss or purchased or obtained a Ford car from him. He testified that he and his family had lived in the apartment rent-free for about six weeks. He stated that Hiss had "insisted that he wanted that car turned over to the open party so it could be of use to some poor organizer in the West or somewhere," and that, at the direction of, or accompanied by, one Peters (whom Chambers identified as the head of the Communist underground in the United States in the 1930's), Hiss left the car at a lot owned or managed by a Communist to be turned over in accordance with Hiss's desire. (Ex. B, pp. 661-672, 1176-1206; especially pp. 666-667, 1182-1189.)

According to the public records of the District of Columbia, title to the Ford car had been transferred by Hiss on July 23, 1936, to Cherner Motor Company of Washington, D. C., and on the same date the title was again transferred by Cherner Motor Company to one William Rosen of 5403 Thirteenth Street, N. W., Washington. This had never been respondent's address. Application for the title was signed "William Rosen," and the signature was acknowledged in Washington before Henry J. Gertler, a notary public, who was secretary-treasurer of the Cherner Motor Company. An official of that company testified that although its records for 1936 bore no sign of any omission or abstraction, the transaction did not appear in its records. (Ex. B, pp. 1056, 1060-1070, 1111-1115, 1222-1227.)

Respondent then appeared before the Committee but refused on the ground of self-incrimination to testify concerning the Ford car or to state whether he was a member of the Communist Party. He testified, however, that he had not been in Washington in 1936. His wife testified that he had never owned a 1929 Ford roadster. (Ex. B, pp. 1207-1222, 1303, 1329-1342.)

(4) The September 4, 1948, issue of the Washington, D. C. *Times-Herald* carried an article under the heading, "Hiss Car Fell in Commie Hands within 24 Hours, Inquiry Shows", which stated that the William Rosen (whose address at that time as noted in the article was respondent's) who got the car the day after Hiss turned it in to Cherner Motor Company in 1936, was at that time a member of the Communist Party. The article further stated that, according to "investigators", Rosen and his wife "had been linked closely to Commie underground workers whose activities overlapped those of persons with whom Hiss had been accused of associating in the Washington spy ring." (R. 66-67.)

(5) On December 31, 1948, a special subcommittee of the Committee on Un-American Activities issued a publication, "Soviet Espionage within the United States Government," which pertained to disclosures of microfilmed copies of confidential Government documents which Chambers stated had been obtained by him from sources within the

State Department. The report indicated that the Chambers "apparatus" continued to function for at least one year after Chambers withdrew from the party in 1939, and that a parallel "apparatus" exposed by Elizabeth Bentley may have continued to operate in Washington thereafter and until the date of the report. (Exhibit entitled "Soviet Espionage within United States Government," p. 9.)

(6) A report to the House of Representatives by the Committee on Un-American Activities, dated December 31, 1948, summarized the previous testimony and stated that it "revealed for the first time the pattern of this espionage apparatus operating through small conspirative groups of about five individuals, and consisting of Government employees stationed in top-flight posts. These groups sometimes do not know of each other's existence. Their contact with the Soviet military intelligence is maintained through a single individual known only by an alias. They have no visible Communist Party ties and disclaim membership or affiliation of any kind. According to the testimony presented, these agents maintain a steady flow of secret and confidential Government documents to special couriers, which are quickly microfilmed for transmission to Soviet intelligence officers after which the originals are returned to Government files. These conspirators also seek to and indeed have influenced major decisions of Government policy." (Exhibit entitled "Report of the Committee on Un-American Activities, etc.," p. 15.)

(7) Respondent was asked, when he appeared before the grand jury, whether he was a member of the Communist Party and refused to answer on the ground of self-incrimination (R. 39). He knew of the accusations made against Hiss before the Committee on Un-American Activities and that the Committee's hearings related to Communist espionage. He had read the newspaper article concerning him in the *Times-Herald*. (R. 40, 42.)

Respondent's fear that answers to the questions concerning the Ford automobile would incriminate him in a federal offense was stated by him to be "due to factors which include the accusations that had been made against the Communist party, the alleged connections of Alger Hiss with the United States Government, and the secretion by him of certain confidential matter which he obtained by reason of his official connection with the Government, and with alleged delivery of those documents or communications to the Intelligence Services of a foreign power * * * the additional factor that * * * [he] may have been connected with Alger Hiss in 1936, on July 23, 1936 * * * And the fact also that * * * [he] may have been connected with other people who were directly and intimately, or in some way, connected with Alger Hiss in any activities" (R. 40).

The District Court found no plausible ground for the asserted belief on the part of respondent that he was in any danger from the questions which

he had refused to answer, and adjudged him guilty of contempt (R. 51-52). Respondent was sentenced to imprisonment for six months or until such time as he purged himself of the contempt by answering the questions (R. 55). The Court of Appeals found justification for the claim of privilege and reversed the conviction (R. 69-76).

### SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred—

1. In holding that respondent had substantial reason for believing that answers to the series of questions propounded to him before the grand jury would tend to incriminate him.

2. In reversing the judgment of conviction.

### REASONS FOR GRANTING THE WRIT

The divergent views in the courts below as to the existence of substantial cause for apprehension of danger to respondent from answers to the questions propounded to him may be attributable to fundamental differences of opinion as to the degree of proximity to criminal implication which must be shown to justify a refusal to answer questions. Clarification by this Court of the proper bounds of the privilege against self-incrimination is urgently needed. Attenuated applications of the privilege in this and similar cases present a serious problem in the administration of justice and the conduct of investigations, particularly at this time when inquiries into the nature and extent of sub-

versive activities which threaten the nation's security are being frustrated by spurious claims of the privilege.

In *United States* v. *Burr*, 25 Fed. Cas. 38, 40, No. 14,692e, Chief Justice Marshall stated that the privilege is limited to answers which might disclose "a fact that would form a necessary and essential part of a crime which is punishable by the laws." This construction was seemingly extended in *Counselman* v. *Hitchcock*, 142 U. S. 547, 585, by the following language:

> * * * It is a reasonable construction, we think, of the constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him."

Subsequently, in *Mason* v. *United States*, 244 U. S. 362, this Court appeared to return to the more restrictive interpretation announced by Chief Justice Marshall. It is not uncommon, however, to find expressions to the effect that the privilege extends to all facts which are "links in the chain of evidence." Cf. *Smith* v. *United States*, No. 292, this Term, slip opinion, p. 12. Such phraseology leaves unresolved the doubt whether the privilege protects only against answers which disclose facts forming "a necessary and essential

part of a crime" (the *Burr* case) or embraces also the disclosure of facts which might furnish clues in searching for other evidence of an incriminating nature (the *Counselman* case *semble*).

But regardless of these doubts, it is at least certain that the constitutional protection against self-incrimination "is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." *Heike* v. *United States,* 227 U. S. 131, 144. Cf. *United States* v. *Sullivan,* 274 U. S. 259. The trial judge was unable to perceive any real danger to respondent and, as this Court observed in *Mason* v. *United States,* 244 U. S. at page 366—

> Ordinarily, he [the trial judge] is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of the right guaranteed, we ought not to interfere.

Despite this admonition to appellate courts to exercise restraint in substituting their judgment for that of trial courts, the Court of Appeals overruled the District Court and found the existence of reasonable cause to apprehend danger.

The decision below represents in our view an extremely tenuous application of the constitutional privilege. Analysis of the data upon which respondent relied to support his claim of privilege

makes it clear that no answers, affirmative or negative, which respondent might have given to the questions addressed to him could have implicated him in any crime for which he could be prosecuted, except in such a remote and speculative sense as to be without the constitutional privilege. We believe the court below erred in its conclusion that (R. 76)—

> Such evidence [respondent's purported connection with the Ford automobile] may show that the appellant was, and perhaps is, a co-conspirator in that [the criminal conspiracy in which Hiss allegedly participated] or related conspiracies for which he [respondent] may be prosecuted.
>
> While the case against Hiss involved charges which he has flatly denied and which have not yet been tried, the questions asked Rosen appear to involve him in these charges.

Granted that evidence of the disposition of the Ford car may serve to corroborate Chambers' testimony and thereby help to incriminate Hiss in a criminal conspiracy, it is not apparent that such evidence would serve (except in an extremely remote and speculative sense) to connect *respondent* with "that or related conspiracies" continuing down to a time not barred by the three-year statute of limitations. The only connection between the Ford transaction and *any* criminal conspiracy lies in Chambers' testimony that Hiss, an alleged par-

ticipant in a conspiracy, may have transferred the car to a Communist organizer. But the transaction involving the car had only collateral significance. No charge was ever made that the automobile had been utilized in or associated with any criminal activity. The disposition of the car was material to the investigation into Communist espionage only as possible corroboration of Chambers' version of the extent and nature of his relations with Hiss. At no point in the testimony before the Committee on Un-American Activities or before the grand jury was any charge made that the person to whom the car was transferred was connected with any Communist "apparatus" for engaging in espionage. Moreover, respondent testified that he had never "seen or talked with or contacted an individual named Alger Hiss" (R. 41). It seems clear, therefore, that, wholly apart from the consideration that the transactions involving the car occurred long before the period of limitation,[2] no answers, affirmative or negative, to the questions about the car can connect respondent with a criminal conspiracy except upon one of the following alternative assumptions: (1) If respondent acknowledges that he was the transferee of the car he may identify himself as a Communist and as such might be regarded as a participant in the criminal conspiracy to commit espionage on the

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[2] The constitutional privilege cannot, of course, be invoked in respect of offenses prosecution of which is barred by the statute of limitations. *Brown* v. *Walker*, 161 U. S. 591, 598.

theory that all Communists were engaged in such activities. (2) If respondent denies that he was the transferee of the car, an inference might nevertheless be drawn that he lent his name to a subterfuge in which an alleged conspirator, Hiss, and the alleged leader of the "underground," Peters, were involved and, therefore, respondent must have participated in the conspiracy. We submit that such assumptions are much too nebulous to warrant an apprehension of a connection between the transfer of the car and the alleged espionage conspiracy. In the first place, no charge has been made that all Communists as such were participants in a conspiracy to commit espionage; and, secondly, any subterfuge to which Hiss and Peters had resorted in disposing of the car had nothing whatever to do with the object or means of the alleged conspiracy.

The only danger to respondent which can reasonably be apprehended from evidence touching the Ford car transaction is his possible identification as a member of the Communist Party. But although membership since *1946* [3] in the Communist Party, with knowledge that it advocates and teaches the overthrow of the Government by force and violence, may subject the member to criminal liability under the Smith Act of 1940, membership in *1936* carries no criminal penalty. The claim of privilege must rest, therefore, upon the validity of a fear that answers connecting respondent with

[3] The three-year statute of limitations applies. 18 U.S.C. 2385, 3282.

the car in 1936 might tend to establish that he was a member of the Communist Party in that year, and, on the theory of a presumption of continuance, that he was a member of the Party in 1946 or thereafter. In our view the connection between the car and a prosecutable offense is too attenuated to support a refusal to answer on that ground.

We appreciate, of course, that in the ordinary case, a factual question does not present an occasion for certiorari; but the situation here fits in with a pattern of resistance to inquiries by grand juries and Congressional Committees that can be resolved only by a sharper delineation of the boundaries of the constitutional privilege than now exists.

CONCLUSION

It is respectfully submitted that a question of importance in the field of judicial and legislative investigations is involved, and, therefore, this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
*Solicitor General.*

JUNE 1949.

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